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IP maven Ron Coleman on developments in trademark, copyright, new media and free speech



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## The Copyright Act: It's a law, dude

We don't mince words at LIKELIHOOD OF CONFUSION® regarding the misuse of copyright and trademark, but we're having trouble finding anything wrong with this at-first-blush shocking story from the [Reuters](#) "news agency":

Federal officials on Wednesday arrested a man on suspicion of violating copyright laws for placing songs on the Internet from an unreleased album by rock band Guns N' Roses. . . .

Cogill, who appeared in court on Wednesday on a charge of unlawfully leaking the songs, faces a maximum of three years in prison if convicted, and five years if it's found that he did it for commercial gain. He was released



on bail.

It's just stealing. Oddly, Bill Patry, when he was blogging, and who is basically my hero for 2008, nonetheless seemed to view it differently when responding to a music industry lawyer's complaint last year. The argument was that "If you add up all the various kinds of property crimes in this country, everything from theft, to fraud, to burglary, bank-robbing, all of it, it costs the country \$16 billion a year. But intellectual property crime runs to hundreds of billions [of dollars] a year. We're having intensive consultations with the leadership in Congress, and we'll be consulting closely with the appropriate committee chairman to try to put the agenda into the appropriate legislative vehicles." Bill [wrote](#):

I am not opposed to all criminal copyright provisions. . . . Very few acts of infringement[, however,] warrant criminal prosecution, which should be limited to large-scale commercial enterprises. . . . I think that taxpayers' money should not be used to enforce private rights which are more than adequately protected by civil remedies .

..

We agree with Bill that violent crime is, on any given day, a more appropriate use of the marginal law enforcement resource than just about anything having to do with intellectual property rights (assuming they are never related). But this is, itself, not an argument; for by such analysis, virtually all policymaking becomes impossible. It is basically [the "man in the moon fallacy," as we call it](#):

"If they can put a man on the moon, why can't they" — anything. Anything that has nothing to do with putting a man in the moon. It is a fallacious argument meant to simulate the argument *a fortiori*, to wit, if they can do the larger A (put a man on the moon) surely then can do the much, much "smaller" B (serve good food on an airplane, get the cable guy to come on time, whatever). Of course B does not in any way flow from such an A; the issues are unrelated; there is no such proof.

Here, too, a major and minor premise are advertised as related and one deducible from the other, but here it is in

reverse: If we have time for vice squad activities by law enforcement, “all the more so” we must have already “put a man on the moon,” i.e., solved terrorism. Oh, we haven’t done B? Then what business do we have doing A?! See what a bad idea A is?

But A does not flow from B at all. They have nothing at all in common **at all** except for the fact that both are described under the very broad rubric of law enforcement functions. But a reduction in vice squad activity in a Midwestern city has **no** bearing on the resources that will actually be made available, consequently, in the activities of entirely different law enforcement agencies, in different places, involving personnel with entirely different qualifications, in fighting terrorism — just as a posited reduction in traffic enforcement, drug enforcement, zoning laws and even burglary, rape and assault investigations are utterly unrelated to terrorism. All these things are “small” B’s to the larger A, but besides being smaller and both being done by people allowed to carry guns, they are completely unrelated.

Bill appears to be saying that, short of large-scale counterfeiting or bootlegging operations, copyright should not be enforced criminally at all, because you can usually use a civil action for copyright infringement to get the job done for a single or multiple, but isolated, case of infringement. Thus he would apparently argue that shutting down a plant that presses 10,000 counterfeit music CD’s in a week would be an appropriate role for law enforcement, but that it should have nothing to do with a 100,000 unconnected “petty” downloads by individuals who may all be working off the same mainframe or server at a large university.

Now, those are mere policy choices. We are [no fan](#) of the RIAA’s shotgun approach to copyright enforcement, and would hardly like it better if it involved the screws. But in contrast, how about the situation in the news report quoted above?

The act of infringement itself, here, would appear to be, when removed from the economic context, fairly trivial: The defendant uploaded a handful of songs to the Internet.

How would a civil law suit help the owner of a work of unquestionably great commercial value, easily digitized, copied and distributed, once an infringer has taken it upon himself to render any possible effort at control over publication and distribution worthless?

No injunction will get a horse back into a barn. Damages are a joke; the defendant is almost certainly judgment-proof, or certainly far out of the range of wealth necessary to satisfy a judgment for either actual or statutory damages consonant, not only with the direct loss in royalties to one creator, but with the vast multiplier effect implicating innumerable individuals and firms, indeed entire economic sectors in some cases, that benefit from a successful economic enterprise — a single hit popular music release.

In such a case, what, besides the risk of doing time in a federal prison, could possibly provide a disincentive to the likes of a creep who would, for whatever weird psychological motives, act so callously in irretrievably destroying someone else’s completely reasonable expectation of benefitting from his own creativity?

In short, maybe “it’s just stealing” isn’t really the point. Perhaps, more appropriately, it’s vandalism. Just open one little gate the night before the drive and you can let an entire herd of cattle escape, and all the preliminary injunctions, depositions and property liens in the world won’t bring them back. Hang ‘em high, we say!

This entry was posted on Thursday, August 28th, 2008 at 3:09 am. You can follow any responses to this entry through the [RSS 2.0](#) feed. You can [leave a response](#), or [trackback](#) from your own site. [Edit this entry](#).

#### 4 Responses to “The Copyright Act: It’s a law, dude”

1. *balt* Says:

[August 28th, 2008 at 10:00 am e](#)

“destroying someone else’s completely reasonable expectation of benefitting from his own creativity”

Assumes facts not in evidence. Art should be created for the love of art, man, not in pursuit of filthy lucre. This guy was just doing GnR a favor by relieving them of the burden of dealing with all that cash.

2. *Dave!* Says:

[August 28th, 2008 at 10:37 am e](#)

No, balt, the real question here is how could anyone consider Chinese Democracy “a work of unquestionably great commercial value”?? 😊

JDSUPRA™  
<http://www.jdsupra.com/post/documentViewer.aspx?fid=4baf385a-3e88-42ba-84e9-16ed1b5706e6>

3. [Ron Coleman](#) Says:  
[August 28th, 2008 at 11:24 am e](#)

You know, balt, you’re right! Information wants to be free! And stuff!

Dave!, notwithstanding that balt is right and we agree how it should be ... you wouldn’t take a 5% of the gross for that album in return for, say, a year’s salary?

4. [pangloss](#) Says:  
[August 29th, 2008 at 4:01 am e](#)

‘How would a civil law suit help the owner of a work of unquestionably great commercial value, easily digitized, copied and distributed, once an infringer has taken it upon himself to render any possible effort at control over publication and distribution worthless?’

As to law suits and incentive for Lawyers to serve C&D letters - [http://www.davenportlyons.com/html/legal\\_services/articles/it\\_newmedia/file\\_sharing.html](http://www.davenportlyons.com/html/legal_services/articles/it_newmedia/file_sharing.html)

“Voluntary Regulation” - [http://www.theregister.co.uk/2008/03/31/virgin\\_media\\_bpi\\_three\\_strikes/](http://www.theregister.co.uk/2008/03/31/virgin_media_bpi_three_strikes/)  
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